Majlis Perbandaran Subang Jaya v Lembaga Rayuan Negeri Selangor & Anor

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO BA-25–84–10 OF 2020
SHAHNAZ SULAIMAN J
7 SEPTEMBER 2023

Administrative Law — Judicial review — Application for — Judicial review against decision of Selangor Appeal Board ('first respondent') in allowing second respondent's appeal against decision of Subang Jaya Municipal Council in rejecting second respondent's application for planning permission to operate kindergarten — Whether first respondent was bound and should apply the stipulations of Guidelines GP027 dated April 2012 and GP027 dated 10 July 2017 — Whether GP027 had force of law — Whether there were procedural impropriety or illegality — Rules of Court 2012 O 53 — Town and Country Planning Act 1976 s 23

The second respondent had made an application to Majlis Perbandaran Subang Jaya ('the applicant') for planning permission (Form C(1)) to operate a kindergarten in a residential house located in Petaling Jaya, Selangor. After considering the said application pursuant to the Town and Country Planning Act 1976 ('Act 172') together with the letters of support from the neighbours, the letters of objection, 'Rancangan Tempatan Majlis Perbandaran Subang Jaya (Perubahan 2020)', as well as 'Garis Panduan Penubuhan Tadika dan Taska (GP027)' dated April 2012 and 10 July 2017, the applicant rejected the second respondent's application. Dissatisfied with the applicant's decision, the second respondent filed an appeal to Lembaga Rayuan Negeri Selangor ('the first respondent'). The first respondent allowed the appeal and consequently, the second respondent's application for the said planning permission was granted. The applicant then filed the present judicial review application seeking the order of certiorari to quash the decision of the first respondent. The issue to be determined by the court was whether the first respondent was bound and should apply the stipulations of Guidelines GP027 dated April 2012 and GP027 dated 10 July 2017 ('GP027').

Held, dismissing the judicial review application with no order as to costs:

(1) Order 53 of the Rules of Court 2012 provided for the procedures for an application for judicial review. It was trite that the decision of a public authority may be reviewed by this court on the grounds of illegality, irrationality, procedural impropriety, or disproportionality. This review was not confined to the decision-making process but also to the merits of the decision (see paras 13–14).

(2) In order for a 'garis panduan' to have the force of law, the court must look to the 'punca kuasa' of the garis panduan. What this entailed was the power from which the 'garis panduan' was made. A reading of the purpose and background to GP027 indicated to the court that GP027 was published in 2012 following from 'Mesyuarat Jawatankuasa Tetap Pengaduan Awam Bil 2/2011' on 6 April 2011. This would appear to be the inception of GP027. There was nothing in GP027 to suggest that it was formulated pursuant to a provision in Act 172. The court therefore opined that if GP027 was not drafted in pursuant to any provision of Act 172, it could not be that GP027 had the force of law. Further, the fact that GP027 had been approved by the Cabinet in the Cabinet Meeting on 21 June 2017 and the 'Mesyuarat Majlis Negara Bagi Kerajaan Tempatan Ke-71' on 10 July 2017, did not equate to GP027 having the force of law (see paras 35 & 38–39).

(3) Section 23 of Act 172 allowed the second respondent to appeal against the decision of the applicant to the first respondent. Both the applicant and the second respondent were given the opportunity by the first respondent to present their respective cases/appeals to the first respondent. The first respondent, in allowing the second respondent's appeal, had given the applicant the jurisdiction to impose conditions to the second respondent. This was to ensure any traffic issues or problems when the parents pick up their children from the kindergarten would be mitigated and reduced. Having perused the affidavits filed, the court was satisfied that the first respondent had followed all procedural requirements. The court therefore found no procedural impropriety or illegality (see paras 40–41).

[Bahasa Malaysia summary

Responden kedua telah membuat permohonan kepada Majlis Perbandaran Subang Jaya ('pemohon') untuk kebenaran merancang (Borang C (1)) untuk mengendalikan tadika di sebuah rumah kediaman yang terletak di Petaling Jaya, Selangor. Selepas mempertimbangkan permohonan tersebut menurut Akta Perancangan Bandar dan Desa 1976 ('Akta 172') berserta surat-surat sokongan daripada jiran, surat-surat bantahan, 'Rancangan Tempatan Majlis Perbandaran Subang Jaya (Perubahan 2020)', serta sebagai 'Garis Panduan Penubuhan Tadika dan Taska (GP027)' bertarikh April 2012 dan 10 Julai 2017, pemohon menolak permohonan responden kedua. Tidak berpuas hati dengan keputusan pemohon, responden kedua memfailkan rayuan kepada Lembaga Rayuan Negeri Selangor ('responden pertama'). Responden pertama membenarkan rayuan tersebut dan seterusnya, permohonan responden kedua untuk kebenaran merancang tersebut telah dibenarkan. Pemohon kemudiannya memfailkan permohonan semakan kehakiman semasa bagi mendapatkan perintah certiorari untuk membatalkan keputusan responden pertama. Isu yang perlu ditentukan oleh mahkamah ialah sama ada responden

pertama terikat dan harus menggunakan ketetapan Garis Panduan GP027 bertarikh April 2012 dan GP027 bertarikh 10 Julai 2017 ('GP027'). A

Diputuskan, menolak permohonan semakan kehakiman tanpa perintah berkaitan kos:

B

(1) Aturan 53 Kaedah-Kaedah Mahkamah 2012 memperuntukkan tatacara bagi permohonan untuk semakan kehakiman. Sudah menjadi undang-undang yang mantap bahawa keputusan pihak berkuasa awam boleh disemak oleh mahkamah ini atas alasan kepenyalahan undang-undang, tidak rasional, ketidakaturan prosedur atau tidak setimpal. Semakan ini tidak terhad kepada proses membuat keputusan tetapi juga kepada merit keputusan (lihat perenggan 13–14). C

(2) Bagi memastikan 'garis panduan' mempunyai kuasa undang-undang, mahkamah mesti melihat kepada 'punca kuasa' garis panduan. Apa yang dimaksudkan adalah kuasa dari mana 'garis panduan' dibuat. Pembacaan ke atas tujuan dan latar belakang kepada GP027 menunjukkan kepada mahkamah bahawa GP027 telah diterbitkan pada 2012 lanjutan daripada 'Mesyuarat Jawatankuasa Tetap Pengaduan Awam Bil 2/2011' pada 6 April 2011. Kelihatannya ini merupakan permulaan GP027. Tiada apa-apa dalam GP027 untuk mencadangkan bahawa ia telah dibuat menurut peruntukan dalam Akta 172. Oleh itu mahkamah berpendapat bahawa jika GP027 tidak digubal menurut mana-mana peruntukan Akta 172, tidak mungkin GP027 mempunyai kuasa undang-undang. Tambahan pula, fakta bahawa GP027 telah diluluskan oleh Kabinet dalam Mesyuarat Kabinet pada 21 Jun 2017 dan 'Mesyuarat Majlis Negara Bagi Kerajaan Tempatan Ke-71' pada 10 Julai 2017, tidak bermaksud bahawa GP027 mempunyai kuasa undang-undang (lihat perenggan 35 & 38–39). D E F G

(3) Seksyen 23 Akta 172 membenarkan responden kedua merayu terhadap keputusan pemohon kepada responden pertama. Kedua-dua pemohon dan responden kedua diberi peluang oleh responden pertama untuk mengemukakan kes/rayuan masing-masing kepada responden pertama. Responden pertama, dalam membenarkan rayuan responden kedua, telah memberikan bidang kuasa kepada pemohon untuk mengenakan syarat kepada responden kedua. Ini bagi memastikan apa-apa isu atau masalah lalu lintas semasa ibu bapa mengambil anak mereka dari tadika dapat diringankan dan dikurangkan. Setelah meneliti afidavit-afidavit yang difailkan, mahkamah berpuas hati bahawa responden pertama telah mengikut semua keperluan prosedur. Oleh itu mahkamah mendapati tiada ketidakaturan prosedur atau kepenyalahan undang-undang (lihat perenggan 40–41).] H I

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 2 CLJ 513, FC (refd)
Beemer Sdn Bhd v Majlis Bandaraya Petaling Jaya [2011] 1 LNS 857, HC (refd)
Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri [2019] 2 MLJ 433; [2019] 2 CLJ 772, CA (refd)
Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor [2017] 3 MLJ 460; [2017] 4 CLJ 434, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)
Vinodh a/l Mariappa v Ketua Pengarah Eksekutif, Lembaga Pembangunan Pelaburan Malaysia, CEO MIDA & Ors [2022] 7 MLJ 456, HC (refd)

Legislation referred to

Local Government Act 1976
Rules of Court 2012 O 53
Town and Country Planning Act 1976 s 23

Manpal Singh Sacdev (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the applicant.
Siti Radziah bt Kamarudin (Selangor State Legal Advisor's Office) for the first respondent.
Manoharan Malayalam (with Anis Salihah bt Abdul Malek) (M Manoharan & Co) for the second respondent.

Shahnaz Sulaiman J:

[1] This is an application for judicial review by the applicant, Majlis Bandaraya Subang Jaya against the decision of the Lembaga Rayuan Negeri Selangor.

RELIEFS SOUGHT

[2] The reliefs sought by the applicant amongst others, are as reproduced below:

B) Peringkat Semakan Kehakiman (Inter-Partes)

2) Bahawa pemohon diberi suatu Perintah Certiorari untuk magakas dan/atau mengenepikan keseluruhan Keputusan/Perintah responden pertama bertarikh 02.07.2020 tersebut yang memutuskan bahawa:

a) Rayuan (oleh responden kedua) ini hendaklah dibenarkan oleh Penolakan Kebenaran Merancang seperti di Borang C (2) 19

December 2019 (oleh pemohon) hendaklah diakaskan dan diganti dengan Kebenaran Merancang dan sahlaku sehingga 31 December 2023;

b) Pihak perayu (iaitu responden kedua di sini) perlu boleh meletakkan syarat-syarat lazim digunapakai seperti syarat keselamatan, syarat-syarat pengangkutan murid-murid, syarat kebersihan dan syarat-syarat am yang dipersetujui di antara pihak perayu (iaitu responden kedua di sini) dan pihak responden untuk mengawal selia aktiviti Tadika Kreatif Inovasi (SA0379017-A) ini; seperti Lampiran A;

c) Pihak perayu (iaitu responden kedua di sini) perlu mendapatkan lesen menjalankan aktiviti ini dan perlu diperbaharui pada Januari setiap tahun sehingga tahun 2023.

FACTUAL BACKGROUND

[3] The second respondent made an application to the applicant for planning permission (Form C(1)) to operate a kindergarten on a residential house with an address at No 23, Jalan SS 19/2, 47500 Subang Jaya, Mukim of Damansara, District of Petaling, Selangor Darul Ehsan ('the kindergarten').

[4] Pursuant to the Town and Country Planning Act 1976, the applicant had considered the second respondent's application for planning permission to operate the kindergarten.

[5] The applicant had considered the 'surat-surat sokongan jiran untuk membuat perubahan material kegunaan bangunan daripada kediaman kepada tadika/taska/pusat jagaan' from seven neighbours. These seven neighbours did not have any objections to the proposed kindergarten.

[6] There was an objection against the second respondent's application from Varatha Raju a/l Munusamy on behalf of Beaconhouse Malaysia Sdn Bhd dated 20 November 2019. There was another letter of objection against the second respondent's application from Ali Raza, the Managing Director of Becaon house Malaysia Sdn Bhd dated 3 December 2019.

[7] In coming to a decision, the applicant had also taken into consideration the following:

(a) 'Rancangan Tempatan Majlis Perbandaran Subang Jaya (Perubahan 2020)';

(b) 'Garis Panduan Penubuhan Tadika dan Taska (GP027)' issued by the 'Jabatan Perancangan Bandar dan Desa Semenanjung Malaysia, Kementerian Perumahan dan Kerajaan Tempatan' dated April 2012; dan

A (c) 'Garis Panduan Penubuhan Tadika dan Taska (GP027)' issued by the 'Jabatan Perancangan Bandar dan Desa Semenanjung Malaysia, Kementerian Perumahan dan Kerajaan Tempatan' dated 10.07.2017.

B **[8]** After a consideration of the matter, the applicant rejected the second respondent's application for a planning permission (Form C(1)) to operate a kindergarten on the said property. As such, a rejection of planning permission (Form C(2)) for the said property dated 19 December 2019 was issued by the applicant to the second respondent.

C **[9]** The second respondent was dissatisfied with the applicant's aforesaid decision and proceeded to file an appeal with the first respondent. The second respondent had filed a Form A, which was the 'Notis Rayuan Terhadap Keputusan Pihak Berkuasa Perancangan Tempatan' dated 6 February 2020 D with the first respondent.

[10] The first respondent had accepted the said notice of appeal in Form A and had informed the same to the applicant by way of a letter dated 7 February 2020.

E **[11]** Thereafter, on or about 2 July 2020, the first respondent had heard the second respondent's appeal, and, inter alia, had made the decisions as follows:

F (a) Rayuan (second respondent) ini hendaklah dibenarkan dan Penolakan Kebenaran Merancang seperti di Borang C (2) 19 December 2019 (by the applicant) hendaklah diakaskan dan digantikan dengan Kebenaran Merancang dan sahlaku sehingga 31 December 2023;

G (b) Pihak responden (the applicant) bolehlah meletakkan syarat- syarat lazim digunapakai seperti syarat keselamatan, syarat-syarat pengangkutan murid-murid, syarat kebersihan dan syarat-syarat am yang dipersetujui di antara pihak perayu (second respondent) dan pihak responden untuk mengawal selia aktiviti Tadika Kreatif Inovasi ini seperti Lampiran A;

H (c) Pihak perayu (second respondent) perlu mendapatkan lesen menjalankan aktiviti ini dan perlu diperbaharui pada Januari setiap tahun sehingga tahun 2023.

[12] Dissatisfied with the decision of the first respondent, the applicant filed this application for judicial review to quash the decision of the first respondent.

I PRINCIPLES RELATING TO JUDICIAL REVIEW

[13] Prior to considering and analysing this application, it would be prudent for this court to reflect on the legal principles relating to judicial review.

Order 53 of the Rules of Court 2012 provides for the procedures for an application for judicial review. A

[14] It is trite that the decision of a public authority may be reviewed by this court on the grounds of illegality, irrationality, procedural impropriety or disproportionality. This review is not confined to the decision-making process but also to the merits of the decision. B

[15] In the Federal Court case, *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 2 CLJ 513, the liberal approach on judicial review in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 has been re-emphasised at pp 571–572 (MLJ); pp 547–548 (CLJ) as follows: C

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin FCJ in agreement) said that an award could be reviewed for substance as well as for process: D
>
> > It is often said that judicial review is concerned not with the decision but the decision making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of *Lord Diplock in Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety. E
> >
> > But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance. F
> >
> > In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit: (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it: G
> >
> > > By 'illegality' as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. H
> > >
> > > By 'irrationality', I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a I

> question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development.

[16] Further, the meaning of error of law has also been explained in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 in the following words:

> Is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

ANALYSIS AND FINDINGS

[17] There is only one issue before this court. The issue before this court is whether the first respondent is bound and should apply the stipulations of Guidelines GP027 dated April 2012 and GP027 dated 10 July 2017.

[18] The applicant argued that the first respondent ought to be bound and should apply the Rancangan Tempatan Majlis Perbandaran Subang Jaya (Pengubalan 2020) which was *gazetted* on 23 June 2016.

[19] In accordance with the said 'Rancangan Tempatan Majlis Perbandaran Subang Jaya (Pengubahan 2020)', inter alia, it was provided that:

1. Setiap kelas guna tanah yang dibenarkan perlu mematuhi Manual Garis Panduan & Piawaian Perancangan Negeri Selangor, Dasar Kerajaan Negeri & Persekutuan, garis panduan khusus dan keperluan daripada jabatan teknikal (see exhibit 'RR-22', p 46, bottom, Nota 1).

[20] It was submitted by the applicant that the Guidelines 0027 dated April 2012 and GP027 dated 10 July 2017 are applicable and ought to be applied by both the applicant and the first respondent.

[21] To support this contention, the applicant argued that guidelines have a force a law.

[22] In *Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri* [2019] 2 MLJ 433; [2019] 2 CLJ 772 (Court of Appeal) (TAB A), His Lordship Abdul Rahmad Sebli, JCA (now FCJ), at p 446 (MLJ); p 785 (CLJ), decided that:

[33] ... *for any guideline to have any force of law, it must be made pursuant to a power given by law ...* (Emphasis added.)

[23] In *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460; [2017] 4 CLJ 434 (Court of Appeal) (TAB B), His Lordship Zamani A Rahim JCA, at p 473 (MLJ); p 447 (CLJ), decided that:

[42] Thus, s 31 of the Drug Dependents (Treatment and Rehabilitation) Act 1983 must be read conjointly with ss 38A and 38B of the Dangerous Drugs Act 1952. *Therefore, the KKM Guidelines Bilangan 6/2002 which is formulated in line with both of the aforesaid Acts and therefore it has the force of law.* (Emphasis added.)

[24] The applicant submitted that the Guideline GP027 were enacted and published by Jabatan Perancangan Bandar dan Desa Semenanjung Malaysia (PLAN Malaysia) under the Kementerian Perumahan dan Kerajaan Tempatan. The governing statutory Acts, include the Town and Country Planning Act 1976 and the Local Government Act 1976. Paragraph 4 of GP027 states as follows:

4.0 Peruntukan Perundangan dan Peraturan

Perancangan dan penubuhan TADIKA dan TASKA adalah tertakluk kepada peruntukan perundangan dan peraturan utama seperti berikut:

i. Kanun Tanah Negara 1965 [Akta 56];

ii. Akta Perancang Bandar dan Desa 1976 [Akta 172];

iii. Akta Kerajaan Tempatan 1976 [Akta 171];

iv. Akta Pelajaran 1961 [Akta 43];

v. Akta Pendidikan 1996 [Akta 550];

A
vi. Akta Taman Asuhan Kanak-Kanak 1984 [Akta 308];

vii. Undang-Undang Kecil Bangunan Seragam 1984 [UKBS, 1984];

viii. Peraturan-Peraturan Pendidikan 1997 & 1998;

B
ix. Peraturan-peraturan Taman Asuhan Kanak-Kanak (Di Institusi) 1985;

x. Arahan Ketua Pengarah (KP) Jabatan Bomba dan Penyelamat Malaysia;

xi. Rujukan Jabatan Bomba dan Penyelamat Malaysia;

C
xii. Kurikulum Asuhan dan Didikan Awal Kanak-Kanak Kebangsaan yang dilaksanakan oleh Kementerian Pendidikan Malaysia (KPM); dan

xiii. Peraturan-Peraturan yang dikeluarkan dari semasa ke semasa.

D
[25] It was further submitted that the GP027 dated 10 July 2017 was approved at the Cabinet Meeting on 21 June 2017 and the Mesyuarat Majlis Negara Bagi Kerajaan Tempatan Ke-71 on 10 July 2017. Learned counsel for the applicant argued that GP027 which was approved in Cabinet Meeting has the force of law, and hence ought to be complied with by both respondents.

E
[26] Further to this, the applicant submitted that the decision of the first respondent would cause non-conformity which, in turn, would result in chaos in the administration.

F
[27] On behalf of the first respondent, the senior federal counsel argued that the first respondent was well within its jurisdiction when it heard the appeal against the decision of the local authority. Reference was made to s 23 of the Town and Country Planning Act 1976 which provides:

G
(1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by —

(a) an applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and

H
(b) a person who has lodged an objection pursuant to subsection 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection.

I
(2) In considering an appeal, the Appeal Board shall hear the appellant and the local planning authority.

(3) After hearing the appeal, the Appeal Board may make an order —

(a) confirming the decision of the local planning authority and dismissing the appeal;

(b) allowing the appeal by directing the local planning authority to grant planning permission absolutely or subject to such conditions as the Appeal Board thinks fit;

(c) allowing the appeal by setting aside any planning permission granted; or

(d) allowing the appeal by directing the local planning authority to remove or modify any condition subject to which planning permission has been granted or to replace the condition with such other condition as the Appeal Board thinks fit.

[28] Founded on the provision of s 23 above, it was submitted that the first respondent was had jurisdiction to hear the appeal from the second respondent against the decision of the applicant. This was a statutory power given to the first respondent (see *Beemer Sdn Bhd v Majlis Bandaraya Petaling Jaya* [2011] 1 LNS 857).

[29] The first respondent submitted that when the appeal by the second respondent was considered by the first respondent, the first respondent had considered the second respondent's letter dated 6 May 2020 stating that the second respondent's kindergarten accepted special needs children and that there were solutions to the traffic issues when the parents pick up their children at the kindergarten.

[30] Both the applicant and the second respondent were given the opportunity by the first respondent to present their respective cases on the appeal.

[31] The first respondent therefore argued that all matters and procedures had been complied with by the first respondent.

[32] Learned counsel for the second respondent argued that the second respondent who was aggrieved by the decision of the applicant dated 19 December 2019 had exercised his right to appeal to the first respondent as provided by s 23 of the Town and Country Planning Act 1976.

[33] The second respondent further submitted that there was no procedural irregularity in the decision making of the first respondent to hear the appeal, consider its merits and to allow or dismiss the appeal.

Whether GP027 has the force of law

[34] The applicant contended that the GP027 has a force of law and ought to be complied with by the applicant and the first respondent. The issue therefore is whether a *garis panduan* has a force of law. It was argued by the

A applicant that the GP027 has the force. The applicant argued that the GP027 was approved at the Cabinet Meeting on 21 June 2017 and the Mesyuarat Majlis Negara Bagi Kerajaan Tempatan Ke-71 on 10 July 2017 and hence by virtue of this, has the force of law.

B **[35]** In order for a *garis panduan* to have the force of law, the court must look to the *punca kuasa* of the *garis panduan*. What this entails is the power from which the *garis panduan* was made (see *Vinodh a/l Mariappa v Ketua Pengarah Eksekutif, Lembaga Pembangunan Pelaburan Malaysia, CEO MIDA & Ors* [2022] 7 MLJ 456).

C

[36] To consider whether the GP027 was legislated pursuant to a *punca kuasa*, this court perused the Garis Panduan Perancangan Dan Penubuhan Tadika dan Taska 2017. The purpose of GP027 is reproduced below:

D > Garis Panduan Perancangan dan Penubuhan Taman Didikan Kanak-kanak (TADIKA) dan Taman Asuhan Kanak-Kanak (TASKA) 2017 (GPPP TADIKA dan TASKA 2017) ini disediakan bertujuan untuk memudah cara serta memberi panduan kepada Pihak Berkuasa Negeri (PBN), pihak berkuasa tempatan (PBT), agensi pelaksana dan pemaju dalam merancang, menubuh dan mengawal pembangunan TADIKA dan TASKA. GPPP TADIKA dan TASKA 2017 ini menggantikan Garis Panduan Penubuhan TADIKA dan TASKA 2012 (GPP TADIKA dan TASKA 2012).

E

[37] The background to GP027 reads as follows:

F > GPP TADIKA dan TASKA telah diterbitkan pada tahun 2012 susulan daripada Mesyuarat Jawatankuasa Tetap Pengaduan Awam Bil 2/2011 pada 6 April 2011 yang dipengerusikan oleh Ketua Setiausaha Negara (KSN) yang mana telah membincangkan isu-isu berkaitan operasi dan penubuhan TADIKA dan TASKA ...

G **[38]** A reading of the purpose and background to GP027 indicates to this court that GP027 was published in 2012 following from Mesyuarat Jawatankuasa Tetap Pengaduan Awam Bil 2/2011 pada 6 April 2011. This would appear to be the inception of GP027. There is nothing in GP027 to suggest that it was formulated pursuant to a provision in the Town and
H Country Planning Act 1976. In the considered view of this court, if GP027 was not drafted in pursuant to any provision of the Town and Country Planning Act 1976, it cannot be that GP027 has the force of law. In this regard, this court respectfully does not agree with the argument by learned counsel for the applicant.

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[39] The applicant argued that the fact that GP027 was approved at the Cabinet Meeting on 21 June 2017 and the Mesyuarat Majlis Negara Bagi Kerajaan Tempatan Ke-71 on 10 July 2017 and hence by virtue of this, has the force of law. In order for any *garis panduan* to have the force of law, there must

exist the *punca kuasa*. In this case, GP027 was approved by the Cabinet. The fact that GP027 has been approved by the Cabinet in the Cabinet Meeting on 21 June 2017 and the Mesyuarat Majlis Negara Bagi Kerajaan Tempatan Ke-71 on 10 July 2017, does not, in the considered view of this court, equate to GP027 having the force of law. If this were the case, there would be made decisions of the Cabinet which would have the force of law. This court is of the view the applicant is stretching the meaning for force of law to include any decisions of the Cabinet. This contention, therefore, cannot stand.

Procedural impropriety

[40] Section 23 of the Town and Country Planning Act 1976 allows the second respondent to appeal against the decision of the applicant to the first respondent. Both the applicant and the second respondent were given the opportunity by the first respondent to present their respective cases/appeals to the first respondent. The first respondent, in coming allowing the second respondent's appeal, had given the applicant the jurisdiction to impose conditions to the second respondent. This was to ensure any traffic issues or problems when the parents pick up their children from the kindergarten would be mitigated and reduced.

[41] Having perused the affidavits filed, this court is satisfied the first respondent had followed all procedural requirements. This court therefore finds no procedural impropriety or illegality.

CONCLUSION

[42] In the upshot, for the above stated reasons, this court dismisses this application for judicial review. There is no order as to costs.

Application for judicial review dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar